Supreme Court, U.S.
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No. 99-942

IN THE

Supreme Court of the United States

NATIONAL AMERICAN INSURANCE COMPANY
and GULF INSURANCE COMPANY,

Petitioners,

v.

RUPPERT LANDSCAPE COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

C. THOMAS BROWN
GLENN H. SILVER
SILVER & BROWN, P.C.
10621 Jones Street
Suite 101
Fairfax, Virginia 22030
(703) 591-6666

JAMES T. BACON
Counsel of Record
11350 Random Hills Road
Suite 700
Fairfax, Virginia 22030
(703) 352-1300

Attorneys for Respondent

157048

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does the opinion of the Fourth Circuit conflict with rulings by this Honorable Court or any courts of appeal?

2. Does the Fourth Circuit's ruling below present a fair and just resolution required by the bankruptcy act?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Ruppert Landscape Company, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case includes numerous misstatements of fact. Respondent offers the following as a correct account of the facts in this case.

Ruppert Landscape Company ("Ruppert") and Green Thumb Landscape Company (either "Green Thumb" or "Debtor") had both provided landscaping services for many years in the Washington D.C. Metropolitan area. Green Thumb was divided into two general divisions. In its landscape maintenance division, Green Thumb provided landscape maintenance services on a yearly basis to various clients. In its landscape installation division, Green Thumb provided new landscape construction in conjunction with new building projects, which projects often required performance bonds. The Sureties provided many of the performance bonds on the Green Thumb landscape installation projects.

In the spring of 1995, Green Thumb began negotiations with Ruppert for the sale of its landscape maintenance division, including equipment, employees and contracts. Many of the assets, which were to be sold to Ruppert, were subject to a lien in favor of NationsBank, Green Thumb's primary lender. The negotiations culminated in a purchase agreement being entered into between Ruppert and Green Thumb on July 31, 1995. Pursuant to the purchase agreement Ruppert acquired landscape maintenance contracts, some vehicles and equipment, and hired some Green Thumb employees associated with the maintenance contracts. Ruppert did not acquire any landscape installation contracts, acquired no contracts upon which Sureties had issued a bond, and did not hire any Green Thumb employees working in

the landscape installation division. The purchase agreement required Green Thumb to complete all of its outstanding contractual commitments, including those for which the sureties had issued bonds. In a separate transaction, Ruppert, using its own funds, purchased from NationsBank promissory notes securing Green Thumb's assets including those assets being purchased by Ruppert.

After the closing and the transfer of the landscape maintenance contracts to Ruppert, Green Thumb continued conducting business on the bonded projects having all of its employees from the landscaping installation division, and having access to all the equipment being used on the bonded jobs. Green Thumb's ultimate inability to complete the bonded landscape installation projects was due to the actions of the Sureties. Following the transaction, the Sureties, pursuant to the terms of the bonds, diverted progress payments being made on the various installation projects from Green Thumb to an affiliated escrow company. According to the testimony of the principals of Green Thumb, the Sureties refusal to release sufficient payments to Green Thumb to allow them to continue making payroll and pay their suppliers, caused work on the installation projects to cease. The Sureties, after causing Green Thumb to cease work on the installation projects, filed an involuntary bankruptcy against Green Thumb on October 27, 1995 at which time a bankruptcy trustee was appointed.

The involuntary bankruptcy petition was contested by Green Thumb. Eventually an order for relief was entered and the case became a bankruptcy proceeding under Chapter 7 of the Bankruptcy Code. In January 1996, Ruppert moved to lift the automatic stay pursuant to 11 U.S.C. § 362 in connection with the secured claims it had purchased from

NationsBank. After a full day hearing, and the presentation of many witnesses, the court granted Ruppert relief from the automatic stay, and found: (i) that Ruppert's liens were valid, secured and perfected; (ii) that Ruppert was the Holder of promissory notes secured by Green Thumb's assets; and (iii) that the "form of the transaction which is consistently documented and does not appear to have been engaged in for any ulterior purpose." In making this ruling, the bankruptcy court expressly reserved the right of the Trustee to challenge the Ruppert/Green Thumb Transaction as a fraudulent conveyance under 11 U.S.C. § 548:

> None of my rulings here today are intended to prejudice the Trustee with respect to any possible Section 548 action here . . . And it's not my intent here to make any rulings that would be binding in a Section 548 action, which is a different creature altogether. I don't mean by saying that to say that I think there is a 548 action here, but I simply that would involve me getting into issues that I don't think I have enough evidence in front of me right now to decide.

Accordingly, in ruling on Ruppert's motion, the only area in which the Court expressly reserved ruling was as to any subsequent action which might be brought by the trustee seeking to set challenge the Ruppert/Green Thumb transaction as fraudulent under 11 U.S.C. § 548.

The Sureties thereafter brought suit in the United States District Court making many of the same challenges to the Ruppert/Green Thumb transactions which had been advanced in the lift stay hearing, and which were preserved for the benefit of the trustee. The Sureties, in their Complaint, set

out four counts: successor liability, tortious interference with contract, statutory conspiracy and common law conspiracy. Each of the counts arose from the same nucleus of facts, challenged the Ruppert/Green Thumb transaction and focused on the transaction as being a fraudulent conveyance, which was reserved to the Trustee under 11 U.S.C. § 548.

REASONS FOR DENYING THE WRIT

I.

THE OPINION BELOW DOES NOT CONFLICT WITH RULINGS BY THIS HONORABLE COURT OR ANY OTHER COURTS OF APPEAL.

The "Question Presented" as framed by the Sureties, and the arguments advanced in the Petition, are not germane to the facts or the disposition of this case as decided by either the United States District Court or by the United States Court of Appeals for the Fourth Circuit. The Sureties argue that the decision by the Fourth Circuit is not harmony with the holding of this Court in *Caplin, Trustee v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 92 S. Ct. 1678, L. Ed. 2d 195 (1972). Petitioners arguments to this Court, however, ignore the relevant facts and the contentions set forth in their own allegations contained in the Complaint.

In *Caplin*, this Court held that a reorganization trustee, acting under Chapter X of the former Bankruptcy Act, had no standing to assert, on behalf of the holders of the debtor's debentures, claims of misconduct against a third party. *Caplin* identified several factors in support of the denial of standing to the trustee. Consideration of the first factor demonstrates the inapplicability of *Caplin* to this case.

In *Caplin*, this Court found that no provision in the bankruptcy statutes provided standing to allow a trustee "to assume the responsibility of suing third parties on behalf of debenture holders" and thereby "collect money not owed to the estate." *Caplin* at 406 U.S. at 428, 92 S. Ct. at 1685. This Court determined that the prior Bankruptcy Act simply did not authorize the trustee to bring such a suit.

Unlike *Caplin*, in this instance the Bankruptcy Act expressly empowered the Trustee to bring suits on behalf of all the creditors, including actions such as those brought by the Sureties. In fact, under the Bankruptcy Act, the Trustee, on behalf of the bankruptcy estate, owns all such causes of action. In this case, if the Sureties were correct, and Ruppert was liable as the successor to pay the liabilities of Green Thumb, Ruppert's obligation would be with respect to all obligations of Green Thumb on behalf of all the creditors, and not just on behalf of the Sureties. 11 U.S.C. § 548 expressly authorizes the Trustee to examine all transactions with the debtor and to seek to avoid any such transaction if made "with actual intent to hinder, delay, or defraud." This is precisely the nature of the Sureties' claims in this case. In this case, the trustee's claim that there has been a fraudulent conveyance is a core proceeding which, if prosecuted, must be prosecuted by the Trustee in the Bankruptcy Court under 28 U.S.C. §§ 157(b)(2)(H) and (O).

Caplin, and the various other cases relied upon by the Sureties, are inapposite to this case. Unlike the Sureties' claims in this case, none of those cases involved actions in which the focus of the challenged transaction was predicated upon successor liability or fraudulent conveyance. Similarly, none of those cases involved a clear application of the bankruptcy code's empowerment of the trustee to bring an

action as is found in 11 U.S.C. § 548. *Caplin* and its progeny simply do not apply to the case at bar.

II.

ANY CONFLICT AMONG THE CIRCUITS RELATED TO *CAPLIN*, HAS NOTHING TO DO WITH THE OPINION RENDERED IN THIS CASE WHICH IS FACTUALLY DISTINCT FROM *CAPLIN* AND ITS PROGENY.

In the case at bar, if the Sureties were correct in the allegations of their claim, all the creditors of Green Thumb would have a stake in exposing any impropriety in the Ruppert/Green Thumb transaction. The result of proving the facts relied upon by the Sureties would be to have Ruppert become responsible as a successor for all the obligations of Green Thumb, the debtor. There is nothing in the record, which demonstrates that the claim of the Sureties was not a general claim, the recovery of which would be for the common benefit of all creditors. In short, the Sureties do not demonstrate that they had a personal cause of action or that they were in a position dissimilar from all other creditors of the bankruptcy estate. Their reliance on *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979 (11th Cir. 1990) and *Williams v. 1st California Bank*, 859 F.2d 664 (9th Cir. 1988) to demonstrate a lack of harmony between the decisions of various Courts of Appeal is misplaced under the facts and circumstances of the case.

The essential holdings of *Williams* and *Hadley* are that a Trustee in Bankruptcy represents the bankruptcy estate, and as such is the representative of all of the unsecured creditors of the bankruptcy estate and that the Trustee's

powers are limited by the Bankruptcy Act. The trustee is not empowered and therefore lacks standing to bring the personal causes of action owned by other creditors, the recovery of which would directly benefit only a particular creditor or class of creditors. Thus, in *Williams v. 1st California Bank, supra,* the Court held that the Trustee was without authority to prosecute a cause of action for a particular class of creditors who had assigned their causes of action to him since the claim was not owned by the bankruptcy estate and any benefit received would inure only to those creditors and not to the bankruptcy estate itself. In *Williams*, there was nothing in the Bankruptcy Act which authorized such a suit and the trustee had no authority to bring the action. Similarly, in *E.F. Hutton & Co., Inc. v. Hadley, supra*, the Court held that a trustee lacked standing to assert the personal claims of customer creditors who had paid the bankrupt in full for securities purchased for them. Again, there was no statutory authority to confer standing upon the *Hadley* trustee to bring the action.

The cause of action at issue in the case at bar is substantially different from those in the cases relied on by the Sureties. In the present case, all of the causes of action alleged are premised on facts amounting to fraudulent conveyance which resulted in damage common to all creditors. The successful prosecution of the Sureties claim would lead to a ruling that Ruppert was responsible for the obligations of Green Thumb, the debtor, which recovery should be administered by the trustee for the benefit of all creditors. The ruling of the court below was consistent with the language of 11 U.S.C. § 548 and was not, in any manner, inconsistent with the holdings of *Caplin, Hadley* or *Williams* in this regard.

In the case at bar, the Court of Appeals analyzed the claims made by the Sureties in their pleadings and correctly found that those claims arose from and focused on the contention that the transfer of Green Thumb's assets to Ruppert Landscaping, if proven, constituted a fraudulent transfer. The court correctly held that if a cause of action existed under the facts and pleadings presented which would fall within the ambit of 11 U.S.C. § 548, that the Trustee must be given the opportunity to bring that claim in the Bankruptcy Court for administration for the benefit of all creditors. The Fourth Circuit Court of Appeals correctly noted, that despite the Sureties' artful pleading to avoid the limitations of 11 U.S.C. § 548 and their attempt to plead a personal cause of action, all of the Sureties' claims had the same focus which would give rise to a claim for the benefit of all the creditors of the bankruptcy estate.[1] All of the claims advanced by the Sureties are based upon the theory of a fraudulent conveyance from the Debtor to Ruppert.

The Sureties, realizing that their pleadings were premised primarily on the alleged fraudulent aspect of the purchase and sale of the Green Thumb assets and that they had unavoidably come within the ambit of 11 U.S.C. § 548, despite the labeling of their causes of action otherwise, have attempted to disassociate their causes of action with the fraudulent aspects of the transfer. However, as the lower

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1. A trustee is authorized to recover § 548 fraudulently transferred property or damages against the transferee under § 550. Under § 551 any fraudulent transfer which is avoided under § 548 "is preserved for the benefit of the estate . . ." Similarly, under § 541 property of the estate includes all recovery under § 550 and any interest in property preserved under § 551. Here there is no doubt the trustee could seek to recover against Ruppert on the alleged facts set forth in the Sureties complaint.

courts found, if the transaction did not involve a fraudulent transfer, then, there would be no factual predicate to support the causes of action for conspiracy, successor liability or tortious interference.

The causes of action, if any, therefore belong to the estate and had to be prosecuted and administered by the Trustee unless abandoned by the Trustee. It is significant that the Sureties never presented any evidence that the Trustee had abandoned his causes of action thereby paving the way for them to bring an action independent of the Trustee, nor did they present any evidence that they requested the Bankruptcy court to order the trustee to seek relief under 11 U.S.C. § 548.

Despite the Sureties contentions to the contrary, the holding of the United States Court of Appeals for the Fourth Circuit in this case is in harmony with the decisions in *Williams v. 1st California Bank, supra*, in *E.F. Hutton & Co., Inc. v. Hadley, supra* and in *Caplin, Trustee v. Marine Midland Grace Trust Co. of New York, supra*. The holding of the Fourth Circuit Court of Appeals is that where the cause of action belongs to the bankruptcy estate, the Trustee has standing to bring the action to protect the interests of all of the creditors of the bankruptcy estate. The corollary to this holding is that where the cause of action does not belong to the bankruptcy estate, the trustee lacks standing to bring the action and the creditor is free to bring the action independent of the trustee. Here, the Petitioners' pleadings demonstrate that its causes of action are predicated upon a fraudulent transfer of assets causing damage to all creditors. The suit, which the Sureties brought, was an asset of the bankrupt's estate to be administered by the trustee in the bankruptcy court.

III.

THE FOURTH CIRCUIT'S RULING PRESENTS A FAIR AND JUST RESOLUTION REQUIRED BY THE BANKRUPTCY ACT AND DOES NOT RESULT IN UNFAIR CLAIM PRECLUSION.

The ruling of the Fourth Circuit is the only result, which is fair, just and workable in light of the bankruptcy filing. Under the Bankruptcy Act all property of the estate belongs to the trustee to administer under 11 U.S.C. § 541. Under 11 U.S.C. § 704 the trustee is charged with the duty to "collect and reduce to money the property of the estate for which such trustee serves . . ." The trustee is also to be "accountable for all property received . . ." The trustee's role is to bring suits such as these on behalf of all the creditors. *See Steyr Daimler-Punch of America Corp. v. Pappas*, 852 F.2d 132, 135 (4th Cir. 1988). As a general matter "[t]he trustee's single effort eliminates the many wasteful and competitive suits of individual creditors." *Koch Ref. v. Farmers Union Cent. Exch. Inc.*, 831 F.2d 1339, 1342-43 (7th Cir. 1987). As the Fourth Circuit noted, "reserving the action for the trustee maintains the integrity of the bankruptcy proceeding and ensures that the individual creditors cannot hijack the bankruptcy process. If it were otherwise, there would be a multijurisdictional rush to judgment whose organizing principle could only be first come first served." Appendix at 6-7. *Citing American Nat'l Bank v. Mortgage America Corp. (In re Mortgage America Corp.)*, 714 F.2d 1266, 1274 (5th Cir. 1983). The goal of bankruptcy is to avoid piecemeal litigation, and to allow all assets of the estate to be collected by the trustee in one forum, subject to the scrutiny of the Bankruptcy Court, the United States Trustee's office and the creditors of the debtor. Its goal is the antithesis

of what has been espoused by the Sureties. Only by ensuring that the action is brought by the trustee in the bankruptcy court, can the asset be effectively administered on behalf of all the creditors. Accordingly, the ruling of the Fourth Circuit that the trustee should be given the "first crack" at this cause of action, and not allow individual creditors to "hi-jack the bankruptcy process", is in compliance not only with the express terms of the Bankruptcy Act but, with the purpose of the Bankruptcy Act.

CONCLUSION

The Petitioners "Question Presented" raises the issue of whether personal causes of action are preempted by 11 U.S.C. § 548. The Sureties suggest that there is a conflict among the circuits on this issue. Even if there were a conflict on this issue, which is by no means clear, this case would not be the appropriate vehicle to resolve the same. The facts of this case do not suggest nor require this Court to apply *Caplin* or its progeny since the Bankruptcy Act clearly empowers the trustee to bring and prosecute the claim at issue this matter. *Caplin* applies only in the absence of clear statutory authority.

The Sureties attempt to fit themselves within the ambit of *Caplin* by suggesting that they have a particular claim against Ruppert the successful resolution of which would not benefit all the debtors' creditors. The Sureties attempts are misplaced. Under the pleadings and facts presented, this Court does not need to reach that issue since the Petitioners have never demonstrated that they have a cause of action particular to themselves. As the lower courts found, and is consistent with the Petitioners' pleadings, the claims made by Petitioners, however couched, are not of a personal nature but were shared in common by the bankruptcy estate and all

of its creditors. The only difference between the claims made by the Sureties and those made by other creditors is the magnitude of their alleged losses which does not elevate their claims to being "personal".

The decision of the United States Court of Appeals affirming the judgment of the United States District Court for the Eastern District of Virginia (Alexandria Division) was correct under 11 U.S.C. § 548 and is consistent with the holdings of this Court. Accordingly, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JAMES T. BACON
Counsel of Record
11350 Random Hills Road
Suite 700
Fairfax, Virginia 22030
(703) 352-1300

C. THOMAS BROWN
GLENN H. SILVER
SILVER & BROWN, P.C.
10621 Jones Street
Suite 101
Fairfax, Virginia 22030
(703) 591-6666

Attorneys for Respondent